DR LOURDES DAVA RAJ CURUZ DURAI RAJ v. DR MILTON LUM SIEW WAH & ANOR

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
ROHANA YUSUF PCA
AZAHAR MOHAMED CJ (MALAYA)
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
NALLINI PATHMANATHAN FCJ
[CIVIL APPEAL NO: 02(i)-118-12-2018(W)]
29 JULY 2020

CIVIL PROCEDURE: *Intervention – Leave to intervene in proceedings – Applicant charged by Malaysian Medical Council ('MMC') for infamous conduct in professional respect – Charge dismissed by MMC – Complainant commenced judicial review against MMC's decision – Applicant not included as party – High Court dismissed application but Court of Appeal granted declaratory reliefs sought by complainant – Applicant applied to intervene in proceedings – Whether applicant adversely affected by declaratory reliefs granted – Whether order null and ought to be set aside – Whether applicant deprived of right to be heard at hearing where order was made – Whether deprivation a breach of rules of natural justice – Whether proceedings had come to end – Whether applicant ought to be allowed to set aside order*

The appellant, the Chief Medical Service Officer and person in charge of Assunta Hospital, was charged by the second respondent, the Malaysian Medical Council ('MMC'), for infamous conduct in a professional respect ('charge'), following a complaint lodged by the first respondent that the appellant was in breach of confidentiality for circulating clinical summaries of patients, to doctors in a committee meeting, without the patients' or next-of-kin's consent. An inquiry carried out found that the appellant had no case to answer. Dissatisfied, the first respondent commenced judicial review proceedings against the MMC, without including the appellant as a party, for (i) an order of *certiorari* against the MMC's decision; and (ii) declarations that the appellant was guilty of the charge and that the MMC be ordered to hear his plea in mitigation and for the imposition of an appropriate sentence. The High Court dismissed the application but the decision was set aside by the Court of Appeal which (i) granted the order of *certiorari* and declared the appellant guilty of the charge; and (ii) directed the MMC to convene the mitigation hearing ('COA decision dated 27 October'). The MMC imposed the punishment of reprimand on the appellant. The appellant applied to the High Court to set aside the reprimand and to obtain a declaration that, since he was not a party to the Court of Appeal proceedings, he was not bound by the COA decision dated 27 October. The application was dismissed by the

A High Court and the appellant did not appeal further. Instead, the appellant appealed to the Court Appeal in the proceedings pursuant to the COA decision dated 27 October, seeking leave to intervene in the proceedings and to set aside the COA order dated 27 October. Dismissing the application to intervene, the Court of Appeal held, *inter alia*, that (i) there was an inordinate B delay in the filing of the motion; (ii) there was a waiver by the appellant in attending the plea in mitigation hearing before the MMC; (iii) the appellant had admitted to the charge; and (iv) intervention should not be allowed where proceedings have come to an end. Hence, the present appeal. The respondents raised preliminary objection and argued that the Federal Court C had no jurisdiction to hear the appeal as the matter did not stem from a decision of the High Court in its original jurisdiction. The questions that arose for adjudication were (i) where, at the hearing of an application for judicial review, an adverse order is made against a person directly affected by the application, whether the order is a nullity within the meaning of the decision in *Muniandy Thamba Kaunda & Anor v. Development & Commercial* D *Bank Berhad & Anor* and ought to be set aside as of right in a case where the person is directly affected: (a) is not served Form 11, the statement and all affidavits in support or notified of the application and date of hearing, in breach of the mandatory requirements of O. 53 r. 4(2) of the Rules of Court 2012 ('ROC'); and (b) was consequently deprived of his right to be heard at E the hearing at which the adverse order was made against him, in breach of the rules of natural justice ('first question'); and (ii) if the first question is in the affirmative, whether the principle in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v. Staghorn Sdn Bhd and Other Appeals* ('*Staghorn*'), that intervention under O. 15 r. 6 of the ROC would not be F allowed where proceedings have come to an end, apply to a case where the order is a nullity for breach of the rules of natural justice and the mandatory requirements of O. 53 r. 4(2) of the ROC and intervention is sought for the purpose of setting aside the order.

Held (allowing appeal; setting aside order of Court of Appeal)

G **Per Nallini Pathmanathan FCJ delivering the judgment of the court:**

(1) The preliminary objection should have been raised at the leave stage as the issue of jurisdiction was related to a threshold requirement. As leave had been granted, it was apparent that the leave panel considered that the Federal Court did have jurisdiction to hear the matter. The first H respondent ought not to lose sight of the fact that, for the purposes of the appeal, the relevant matter in the High Court was not the reprimand imposed upon the appellant by the MMC, but the judicial review proceedings filed by the first respondent to obtain an order of *certiorari* against the MMC's finding of no case to answer and the declaratory

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relief. The motion to intervene and to set aside the COA order dated 27 October was not filed in the s. 31 appeal proceedings. Moreover, there was no appeal against the High Court decision to dismiss the appeal. It could be seen from the case number under which the first respondent filed motion encl. 7(a) that it was filed in the appeal arising out of the High Court decision to dismiss the first respondent's judicial review application. It is trite that judicial review proceedings are appealable to the Federal Court. The preliminary objection was dismissed. (paras 25-27)

(2) The appellant was a person directly affected by the judicial review application by the first respondent because the prayers sought to overturn the MMC's decision that the appellant was not guilty of the charge, find him guilty of the charge and convene to hear his plea in mitigation. Where the livelihood of a person is at stake, that person ought to be accorded all the rights he is entitled to, paramount of which was the right to be heard in his own cause, to be accorded a fair hearing and given the opportunity to defend himself against the charge proffered against him. It was untenable for the first respondent to contend that the appellant would not be directly affected when his name appeared in the order of the Court of Appeal. The order sought by the first respondent effectively usurped the power of the MMC to regulate the conduct of its own members as the court order in his favour removed from the MMC its power to decide on whether the charge had been made out. The principles of natural justice are not satisfied by reason of the appellant having the opportunity to defend himself in the domestic inquiry proceedings. The right to be heard extended to all stages of the proceedings which affected him and this included the judicial proceedings. (paras 30, 31, 35 & 38)

(3) In *Staghorn*, the issues of an affected party not being given notice, and not being accorded the opportunity to be heard in his own defence, did not arise in the same manner as in the present appeal. Therefore, *Staghorn* was inapplicable to the factual matrix of the present case as the facts, law and considerations were entirely different and distinguishable. (paras 43 & 44)

(4) The first question was answered in the affirmative while the second question was answered in the negative. The COA decision dated 27 October was set aside. All steps and any action taken by the respondents pursuant to the order of the COA decision dated 27 October was set aside and any endorsement of the decision and order of the respondents on the Malaysian Medical Registry was nullified. The decision and order of the second respondent to dismiss the charge against the appellant was reinstated. (paras 61 & 62)

A ***Bahasa Melayu*** *Headnotes*

Perayu, Ketua Perkhidmatan Perubatan dan Pengurus Hospital Assunta, dituduh oleh responden kedua, Majlis Perubatan Malaysia ('MPM'), atas kelakuan buruk dari segi profesion ('pertuduhan'), susulan aduan oleh responden pertama bahawa perayu memecah rahsia kerana mengedar
B ringkasan pesakit-pesakit kepada para doktor dalam satu mesyuarat ahli jawatankuasa, tanpa kebenaran pesakit-pesakit tersebut atau waris mereka. Satu inkuiri yang dijalankan mendapati perayu tiada kes untuk dijawab. Tidak berpuas hati, responden pertama memulakan prosiding semakan kehakiman terhadap MPM, tanpa menyertakan perayu sebagai pihak, untuk
C (i) satu perintah *certiorari* terhadap keputusan MPM; dan (ii) pengisytiharan bahawa perayu bersalah atas pertuduhan dan MPM diperintahkan mendengar pli dalam mitigasi dan menjatuhkan hukuman wajar. Mahkamah Tinggi menolak permohonan tetapi keputusan tersebut diketepikan oleh Mahkamah Rayuan yang (i) membenarkan perintah *certiorari* dan mengisytiharkan perayu
D bersalah atas pertuduhan; dan (ii) memerintahkan MPM mengadakan pendengaran mitigasi ('keputusan MR bertarikh 27 Oktober'). MPM menjatuhkan hukuman berbentuk teguran terhadap perayu. Perayu memohon pada Mahkamah Tinggi untuk mengetepikan teguran tersebut dan untuk mendapatkan pengisytiharan bahawa, oleh kerana dia bukan pihak dalam
E prosiding Mahkamah Rayuan, dia tidak terikat dengan keputusan MR bertarikh 27 Oktober. Permohonan tersebut ditolak oleh Mahkamah Tinggi dan perayu tidak merayu. Sebaliknya, perayu merayu pada Mahkamah Rayuan dalam prosiding bersangkutan keputusan MR bertarikh 27 Oktober, memohon kebenaran mencelah dalam prosiding tersebut dan mengetepikan
F perintah MR bertarikh 27 Oktober. Menolak permohonan mencelah tersebut, Mahkamah Rayuan memutuskan, antara lain; (i) berlaku kelengahan terlampau dalam memfailkan usul; (ii) terdapat pengetepian oleh perayu apabila beliau menghadiri pendengaran pli mitigasi di hadapan MPM; (iii) perayu telah mengaku bersalah atas pertuduhan; dan (iv) pencelahan tidak sepatutnya dibenarkan apabila prosiding sudah
G berakhir. Maka timbul rayuan ini. Responden membangkitkan bantahan awalan dan menegaskan Mahkamah Persekutuan tiada bidang kuasa mendengar rayuan ini kerana hal perkaranya tidak timbul daripada keputusan Mahkamah Tinggi dalam bidang kuasa asalnya. Soalan-soalan yang timbul untuk diputuskan adalah (i) apabila, semasa pendengaran
H permohonan semakan kehakiman, satu perintah bertentangan dibuat terhadap seseorang yang terjejas secara langsung oleh permohonan tersebut, sama ada perintah ini terbatal dalam maksud keputusan *Muniandy Thamba Kaunda & Anor v. Development & Commercial Bank Berhad & Anor* dan harus diketepikan sebagai hak dalam kes apabila seseorang terjejas secara langsung:
I (a) tidak disampaikan Borang 11, pernyataan dan semua afidavit sokongan

atau dimaklumkan tentang permohonan dan tarikh pendengaran, satu pelanggaran syarat wajib A. 53 k. 4(2) Kaedah-kaedah Mahkamah 2012 ('KKM'); dan (b) seterusnya dinafikan hak didengar semasa pendengaran yang dalamnya perintah bertentangan dibuat terhadapnya, satu pelanggaran bawah kaedah-kaedah keadilan asasi ('soalan pertama'); dan (ii) jika soalan pertama dijawab secara afirmatif, sama ada prinsip dalam *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v. Staghorn Sdn Bhd and Other Appeals* ('*Staghorn*'), pencelahan bawah A. 15 k. 6 KKM tidak akan dibenarkan apabila prosiding sudah tamat, terpakai pada kes apabila perintah terbatal atas sebab pelanggaran kaedah-kaedah keadilan asasi dan syarat-syarat wajib A. 53 k. 4(2) KKM dan pencelahan yang dipohon bertujuan mengetepikan perintah tersebut.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Rayuan)

Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1) Bantahan awalan sepatutnya dibangkitkan pada peringkat kebenaran kerana isu bidang kuasa bersangkut paut dengan syarat ambang. Oleh kerana kebenaran sudah diberi, jelas bahawa panel yang memberi kebenaran berpendapat Mahkamah Rayuan mempunyai bidang kuasa mendengar hal perkara tersebut. Responden pertama tidak sepatutnya terlepas pandang fakta bahawa, untuk tujuan rayuan, hal perkara relevan di Mahkamah Tinggi bukan hukuman berbentuk teguran yang dijatuhkan atas perayu oleh MPM tetapi prosiding semakan kehakiman yang difailkan oleh responden pertama untuk memperoleh satu perintah *certiorari* terhadap dapatan MPM tentang tiada kes untuk dijawab dan relief pengisytiharan. Usul untuk mencelah dan mengetepikan perintah MR bertarikh 27 Oktober tidak difailkan dalam prosiding rayuan s. 31. Tambahan lagi, tiada rayuan terhadap keputusan Mahkamah Tinggi untuk menolak rayuan. Ini boleh dilihat berdasarkan nombor kes yang responden pertama memfailkan usul lampiran 7(1) dan ini difailkan dalam rayuan yang timbul daripada keputusan Mahkamah Tinggi menolak permohonan semakan kehakiman oleh responden pertama. Matan bahawa prosiding semakan kehakiman boleh dirayu pada Mahkamah Persekutuan. Bantahan awalan ditolak.

(2) Perayu ialah orang yang terjejas secara langsung oleh permohonan semakan kehakiman oleh responden pertama kerana permohonan-permohonan yang dibuat bertujuan mengubah keputusan MPM bahawa perayu tidak bersalah atas pertuduhan, mendapatinya bersalah atas pertuduhan dan mendengar pli mitigasinya. Apabila mata pencarian seseorang menjadi pertaruhan, orang tersebut harus diberi semua hak

yang dia berhak, terutama sekali hak didengar dalam kausanya sendiri, diberi pendengaran adil dan peluang membela diri terhadap pertuduhan terhadapnya. Hujahan responden pertama, iaitu perayu tidak akan terjejas secara langsung, tidak boleh dipertahankan kerana nama perayu tertera pada perintah Mahkamah Rayuan. Perintah yang dipohon oleh responden pertama, secara kesannya, merampas kuasa MPM dalam mengawal selia perilaku ahli-ahlinya sendiri kerana perintah mahkamah yang berpihak padanya melenyapkan kuasa MPM untuk memutuskan sama ada pertuduhan telah dibuktikan. Prinsip keadilan asasi tidak dipenuhi hanya kerana perayu diberi peluang membela dirinya dalam prosiding inkuiri domestik. Hak didengar merangkumi semua peringkat prosiding yang menjejaskannya dan ini termasuk prosiding kehakiman.

(3) Dalam *Staghorn*, isu-isu seperti seorang pihak terjejas tidak diberi notis dan tidak diberi peluang didengar pembelaannya tidak timbul seperti dalam rayuan ini. Oleh itu, *Staghorn* tidak terpakai pada rentetan fakta kes ini kerana fakta, undang-undang dan pertimbangan-pertimbangannya berlainan sama sekali dan boleh dibezakan.

(4) Soalan pertama dijawab secara afirmatif manakala soalan kedua dijawab secara negatif. Keputusan MR bertarikh 27 Oktober diketepikan. Kesemua langkah dan apa-apa tindakan yang diambil oleh responden-responden ekoran perintah MR bertarikh 27 Oktober diketepikan dan apa-apa endorsmen keputusan dan perintah responden-responden dalam Daftar Perubatan Malaysia dibatalkan. Keputusan dan perintah responden kedua menolak pertuduhan terhadap perayu dihidupkan semula.

Case(s) referred to:

B Surinder Singh Kanda v. The Government Of The Federation Of Malaya [1962] 1 LNS 14 ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Bolton v. Law Society [1994] 1 WLR 531 ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All ER 935 ***(refd)***

Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062 CA ***(dist)***

FW Goonetilleke v. The Medical Council [1911] 1 LNS 12 ***(refd)***

Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals [2008] 2 CLJ 121 FC ***(dist)***

Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor [1996] 2 CLJ 586 FC ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***

North West Water Ltd v. Binnie & Partners (a firm) [1990] 3 All ER 547 QBD ***(dist)***

Regina v. Rent Office Service & Anor, ex-parte Muldoon [1996] 1 WLR 1103 ***(dist)***

Trikkon Sdn Bhd v. Mahinder Singh Dulku [2010] 5 CLJ 850 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 96(a)

Medical Act 1971, ss. 3, 4, 4A(2)(b), (c), 29(2)(b), 31(2)

Rules of Court 2012, O. 15 r. 6, O. 53 r. 4(2)

For the appellant - Lambert Rasa-Ratnam & Chan Mun Yew; M/s Lee Hishammuddin Allen & Gledhill
For the 1st respondent - Anit Kaur Randhawa & Phang See Eng; M/s Asbir Hira Singh & Co
For the 2nd respondent - Gurdev Singh Bal; M/s Irmohizam Gurdev & Co

[Editor's note: For the Court of Appeal judgment, please see Dr Milton Lum Siew Wah v. Malaysian Medical Council & Anor; Dr Lourdes Dava Raj Curuz Durai Raj (Proposed Intervener) [2018] 1 LNS 1083 (overruled).]

Reported by Najib Tamby

JUDGMENT

Nallini Pathmanathan FCJ:

[1] This appeal raises a conflict between two seemingly contradictory principles which the courts need to balance. Between the policy of avoiding the opening of the floodgates to endless litigation by upholding finality in judicial decisions on the one hand, and on the other, protecting the sacrosanct rights of an affected person to be accorded the right to be heard in his own defence; which should prevail? Ultimately based on the particular facts of the instant appeal, we decided in the interests of the affected person, the appellant before us, whose livelihood would be threatened by the order obtained by the first respondent against him *in absentia*. We append the reasons for our decision below.

Salient Background Facts

[2] At the material time, the appellant before us, Dr. Lourdes Dava Raj a/l Curuz Durai Raj ('Dr. Lourdes') was the Chief Medical Service Officer and person in charge of Assunta Hospital while the first respondent before us, Dr. Milton Lum Siew Wah ('Dr. Milton') was then a Visiting Consultant Obstetrician & Gynaecologist at the same hospital.

[3] The second respondent before us is the Malaysian Medical Council ('MMC'), a statutory body established pursuant to s. 3 of the Medical Act ('MA') 1971. The MMC's dual functions are to register medical practitioners and to regulate the practice of medicine (see s. 4 of the MA 1971) and in furtherance of its functions, it has the power to regulate the standards of practice as well as the professional conduct and ethics of registered medical practitioners (see s. 4A(2)(b) and (c) of the MA 1971).

[4] It is not in dispute that Dr. Lourdes circulated clinical summaries of a total of six patients to doctors for the purpose of discussion during Medical and Dental Advisory Committee meetings at Assunta Hospital on 23 September 2009 and 9 December 2009. This committee was tasked with studying the morbidity and mortality in those cases with the end aim of improving the standard of medical care in the said hospital.

[5] Dr. Milton was among the doctors who received the summaries. He took exception to the fact that Dr. Lourdes circulated the said documents without a cover of confidentiality and without informing the committee that the prior consent from the patients or their next-of-kin had been obtained. This, he contended, was a breach of confidentiality and a violation of section 2.2.2 of the MMC's Code of Professional Conduct, section 3.2 of the MMC's Guideline "Good Medical Practice" and sections 1, 2, 8d and 9 of MMC's Guideline "Confidentiality". He complained to the then President of the MMC, Tan Sri Dr. Hj Mohd Ismail Merican, in a letter dated 31 December 2009.

[6] Based on Dr. Milton's complaint, the preliminary investigation committee I of the MMC charged Dr. Lourdes with infamous conduct in a professional respect, as informed in the letter dated 25 March 2013. In the same letter, Dr. Lourdes was requested to elect either to state his defence before the said preliminary investigation committee or to have the matter referred to the Malaysian Medical Council for an inquiry. He chose the former and the inquiry was held on 20 May 2014.

[7] Before the inquiry, Dr. Lourdes affirmed a statutory declaration on 19 May 2014. He explained that he had been newly appointed as the person in charge of the hospital at the material time, and only realised that he may have breached the confidentiality requirement when Dr. Milton raised this issue during the second meeting on 9 December 2009. He averred that thereafter, he stopped doing so and endeavored to strictly adhere to the guidelines and relevant legislation.

[8] In his defence, he averred that it was the doctors attending the committee meeting who requested the clinical summaries of the presenting doctors prior to the meeting. Despite being aware of doctor-patient confidentiality, he did not realise it was applicable in the context of a mortality and morbidity assessment meeting. He asserted that he disclosed patient names not with any *mala fides*, but did so in the interests of continuing medical education. He therefore contended that such an inadvertent act would not amount to "infamous conduct in a professional respect".

[9] On 20 May 2014, the inquiry was carried out. By a majority, the MMC found that Dr. Lourdes had no case to answer. However, they noted that there were lapses and deficits in relation to handling documents in the hospital and advised him to improve this. Dr. Lourdes was officially informed of this by way of a letter dated 12 June 2014 from the then President of the MMC, Datuk Dr. Noor Hisham Abdullah.

[10] To the knowledge of Dr. Lourdes, the matter ended there. However, Dr. Milton was dissatisfied with the outcome of the inquiry and proceeded to institute judicial proceedings, as set out below.

The Proceedings

[11] The chronology of the judicial and disciplinary proceedings in this matter are set out at length below as the first respondent defended the appellant's present appeal on the grounds of, *inter alia*, delay and *res judicata*. As such, it is important to appreciate the detailed chronology of events to comprehend why we did not concur with the first respondent's stance.

The High Court

[12] On 26 August 2014, Dr. Milton was granted leave to institute judicial review proceedings for an order of *certiorari* against the MMC's majority decision that no case had been made out against Dr. Lourdes. Dr. Milton sought additionally, a declaration that Dr. Lourdes was guilty of the charge against him and that the MMC be ordered to hear his plea in mitigation and for the imposition of an appropriate sentence. It is of considerable significance that Dr. Milton filed the judicial review application only against MMC, and did not include Dr. Lourdes as a party.

[13] The High Court dismissed Dr. Milton's judicial review application with costs of RM10,000. The learned judge however failed to address or discuss the failure to include Dr. Lourdes as a party to the judicial review proceedings. Instead, the thrust of the judgment centred on the premise that Dr. Milton had no *locus* to institute the proceedings as he was not a person adversely affected by the decision of MMC. As he had brought the proceedings to assert public rights and/or the preservation of the public confidence in the medical profession, the judge held that the proper party to institute proceedings was the Attorney General, who is properly vested with power to assert a public right by way of public law litigation. On that ground alone, Dr. Milton's case, it was held, ought to be dismissed.

[14] The judge went on to deal with the merits of the judicial review application. Firstly, Her Ladyship found that Dr. Lourdes had not expressly admitted to the charge against him. Secondly, Dr. Milton had failed to show that the decision of the MMC was tainted with illegality, irrationality, procedural impropriety, or that irrelevant matters had been taken into consideration and/or that relevant matters had not been taken into consideration. Hence, there was no basis for the court to interfere with the majority findings by the MMC that Dr. Lourdes was not guilty of the charge against him.

The Court Of Appeal

[15] Dr. Milton succeeded in his appeal to the Court of Appeal. On 27 October 2015, the Court of Appeal allowed Dr. Milton's appeal, set aside the High Court decision, and granted the order of *certiorari* as well as the declaration sought by Mr. Milton to the effect that Dr. Lourdes was guilty

of the charge of a breach of confidentiality. It remained for the MMC to hear Dr. Lourdes' plea in mitigation and punish him. Of particular significance once again, is that Dr. Lourdes was not heard in his own defence at the hearing of the appeal before the Court of Appeal, because he had not been made a party to those judicial review proceedings.

[16] As directed by the Court of Appeal, on 21 June 2016, the MMC convened the mitigation hearing. There is no dispute that Dr. Lourdes was accorded the right to be heard at this stage and was represented by counsel. It is noteworthy that no attempt was made at this stage by Dr. Lourdes to dispute or set aside the orders made in the judicial review proceedings, despite not having been heard.

MMC's Hearing On Mitigation And Punishment

[17] At the outset of the mitigation hearing, Dr. Lourdes' counsel, Ms. Shanti Abraham made several preliminary objections. Of relevance to the present appeal is the objection that Dr. Lourdes was not bound by the decision of the Court of Appeal, as he was not a party to the court proceedings. She placed on record that she and her client attended the mitigation hearing under protest. She also raised other pertinent issues which severely prejudiced Dr. Lourdes.

[18] The MMC imposed the punishment of reprimand on Dr. Lourdes.

Appeal Against MMC's Decision By Dr. Lourdes

[19] In response to the punishment meted out by the MMC, Dr. Lourdes filed an originating summons under s. 31 of the Medical Act 1971 seeking to set aside the reprimand and to obtain a declaration that since he was not a party to the Court of Appeal proceedings, he was not bound by the Court of Appeal decision dated 27 October 2015.

[20] The High Court dismissed Dr. Lourdes' originating summons. However, Dr. Lourdes did not further appeal to the Court of Appeal. The High Court decided so on the grounds that the MMC was bound by the decision of the Court of Appeal until it was set aside, and that the High Court was not a suitable avenue to challenge a decision of the Court of Appeal.

[21] Dr. Lourdes then appealed to the Court of Appeal, but in the proceedings pursuant to which the Court of Appeal order dated 27 October 2015 was issued. He sought leave of the court to intervene in the Court of Appeal proceedings and to set aside the Court of Appeal order dated 27 October 2015.

The Decision Of The Court Of Appeal

[22] In summary, the Court of Appeal held that:

(i) There was inordinate delay in the filing of the motion, that delay extending to almost two years after the first order of the Court of Appeal, finding Dr. Lourdes guilty of the charge. (The Court of Appeal did not consider nor give weight to the subsequent events that occurred during the two year period.);

(ii) There was waiver by Dr. Lourdes in attending the plea in mitigation hearing before the MMC. (The Court of Appeal failed to consider or give weight to the numerous preliminary objections made by counsel before the MMC, and the express stipulation that participation was without prejudice to steps taken to defend or set aside the order made against Dr. Lourdes);

(iii) Dr. Lourdes had admitted to the charge. (The Court of Appeal failed to consider that he had only admitted to the circulation of the information to a limited number of persons for a limited and legitimate purpose. He had not admitted to breaching patient confidentiality *per se*.);

(iv) There was no prejudice to Dr. Lourdes;

(v) Applying *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121; [2008] 2 MLJ 622 ('*Staghorn*'), the Court of Appeal concluded that intervention should not be allowed where proceedings have come to an end. (The Court of Appeal failed to consider the breach of natural justice arising from the failure to include Dr. Lourdes as a party to the judicial review proceedings initiated by Dr. Milton.)

[23] The Court of Appeal therefore found no merits in the motion and dismissed his application to intervene. That decision led to the present appeal before us.

[24] The Federal Court granted leave on the following questions of law:

The First Question Of Law

Where at the hearing of an application for judicial review an adverse order is made against a person directly affected by the application, whether the order is a nullity within the meaning of the decision in *Muniandy a/l Thamba Kaunda & Anor v. D & C Bank Berhad & Anor* (FC) [1996] 1 MLJ 374 and ought to be set aside as of right, in a case where the person directly affected:

a) is not served Form 110, the statement and all affidavits in support or notified of the application and date of hearing, in breach of the mandatory requirements of Order 53 Rule 4(2), Rules of Court 2012; and

b) was consequently deprived of his right to be heard at the hearing at which the adverse order was made against him, in breach of the rules of natural justice.

The Second Question of Law

If the answer to Question 1 is in the affirmative, whether the principle in *Hong Leong Bank Bhd* (formerly known as *Hong Leong Finance Bhd) v. Staghorn Sdn Bhd and Other Appeals*, FC [2008] 2 MLJ 622, that intervention under Order 15 Rule 6 of the Rules of Court will not be allowed where proceedings have come to an end, apply to a case where the order is a nullity for breach of the rules of natural justice and the mandatory requirements of Order 53 Rule 4(2), Rules of Court 2012 and intervention is sought for the purpose of setting aside the order.

Our Analysis Of The Submissions Before The Federal Court

The Preliminary Objection

[25] We will briefly deal with the preliminary objection raised by the respondents that the Federal Court has no jurisdiction to hear this appeal as this matter did not arise from a decision of the High Court in its original jurisdiction. First, such an objection should have been raised at the leave stage as the issue of jurisdiction is one which relates to a threshold requirement. As leave has been granted, it is apparent that the leave panel considered that the Federal Court did in fact have jurisdiction to hear this matter.

[26] Secondly, we are of the view that the respondents ought not to lose sight of the fact that for the purposes of this appeal, the relevant matter in the High Court is not the s. 31 appeal by Dr. Lourdes as to the reprimand imposed upon him by the MMC, but the judicial review proceedings filed by Dr. Milton to obtain an order of *certiorari* against the MMC's finding of no case to answer and declaratory relief. The motion to intervene and set aside the Court of Appeal order dated 27 October 2015 was not filed in the s. 31 appeal proceedings.

[27] Moreover, it is not in dispute that there was no appeal against the High Court decision to dismiss the appeal on 22 August 2017. It can be seen from the case number under which Dr. Lourdes filed motion encl. 7(a) that it was filed in the appeal arising out of the High Court decision to dismiss Dr. Milton's judicial review application. It is trite that judicial review proceedings are appealable to the Federal Court. The preliminary objection was therefore dismissed.

The First Question Of Law

[28] In the first question of law, Dr. Lourdes relied on the case of *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor* [1996] 2 CLJ 586; [1996] 1 MLJ 374 ('*Muniandy*') to urge the court to recognise that it is a breach of natural justice not to accord Dr. Lourdes the right to be heard. *Muniandy* is authority for the well-settled principle of

law that an order made against a party in breach of his fundamental right to be heard is a breach of natural justice. It renders the order a nullity and is liable to be set aside. The first respondent's counsel argued that *Muniandy* (above) could be distinguished on its factual matrix from the present case.

[29] Counsel for the appellant argued that although *Muniandy* (above) was decided in relation to different facts which raised different provisions of law from the present case, the court ought to similarly recognise that all parties directly affected ought to be served with cause papers and heard. This is also a statutory requirement under O. 53 r. 4(2) of the Rules of Court (RC) 2012, which is set out below for ease of reference:

> **O. 53 r. 4 Notice**
>
> (1) Where leave has been granted under this rule, the applicant shall, within fourteen days after the grant of such leave, file a notice in Form 110.
>
> (2) Upon extraction of the sealed copy of Form 110, **the applicant shall serve** a copy of the same together with a copy of the statement and all affidavits in support **on all persons directly affected by the application** not later than fourteen days before the date of hearing specified in the Form 110. (emphasis added)

[30] Counsel for the appellant contended, in our view quite rightly, that Dr. Lourdes is a person directly affected by the judicial review application by Dr. Milton because:

(i) the prayers seek to overturn the MMC's majority decision that Dr. Lourdes was not guilty of the charge against him; and

(ii) find him guilty of the charge; and

(iii) convene to hear his plea in mitigation.

[31] We are of the view that where the livelihood of a person is at stake, that person ought to be accorded all the rights he is entitled to, paramount of which is the right to be heard in his own cause, to be accorded a fair hearing and given the opportunity to defend himself against the charge proffered against him.

[32] In this regard, it is untenable to contend that Dr. Lourdes was directly affected by the decision of the MMC but not directly affected by the decision of the Court of Appeal. The first respondent claimed that the MMC, which imposed punishment on Dr. Lourdes, is an intermediary agency, citing the case of *Regina v. Rent Office Service & Anor, ex-parte Muldoon* [1996] 1 WLR 1103 ('*Muldoon*') which concerned a provision equivalent to our O. 53 r. 4(2) RC 2012.

[33] *Muldoon* (above) is distinguishable on the following basis. The facts of that case pertained to judicial review sought by citizens who wanted the Liverpool City Council to determine their housing benefit claims. The party who sought to be added as a party to the proceedings was the Secretary of State for Social Security. In that case, the House of Lords found that the Secretary could not be said to be a person directly affected by the decision of the Liverpool City Council as he was, in the words of Lord Keith of Kinkel at p. 1105, "only indirectly affected, by reason of his collateral obligation to pay subsidy to the local authority."

[34] We are of the view that the consequence of the Secretary not being added as a party to the proceedings cannot be equated to Dr. Lourdes whose very livelihood and reputation are directly affected by the decision of the Court of Appeal. The Secretary's only concern was the increase in the amount of subsidies he might have to pay to local authorities. Therefore he is "indirectly affected" as his concern is related to State money, not his own, although he is acting in the interest of the State. On the other hand, Dr. Lourdes is personally affected by the judicial review proceedings instituted by Dr. Milton and is therefore directly affected.

[35] It is untenable for the first respondent to contend that Dr. Lourdes would not be directly affected when his name appears in the order of the Court of Appeal. The order sought by Dr. Milton effectively usurps the power of the MMC to regulate the conduct of its own members as the court order in his favour removes from the MMC its power to decide on whether the charge against Dr. Lourdes has been made out. Hence, we rejected this submission.

[36] We also noted that Dr. Milton did not pray for the matter to be remitted for a different composition of the Disciplinary Board to re-hear Dr. Lourdes' defence and make a decision, which he could have very well prayed for. Instead, Dr. Milton asked the court to step into the shoes of the Disciplinary Board composed of doctors tasked with overseeing and regulating MMC's own members, of the medical profession, and find Dr. Lourdes guilty. As correctly stated by the High Court, it is better for a professional body such as the MMC to manage its own members in relation to their conduct, so the court should not readily interfere with findings by the MMC, unless the decision is perverse or takes into account irrelevant matters or fails to take into account relevant matters, or contravenes the doctrine of proportionality (see *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All ER 935; [1985] AC 374; [1984] UKHL 9).

[37] We are in agreement with the view of the High Court which is based on case law such as the Privy Council case of *FW Goonetilleke v. The Medical Council* [1911] 1 LNS 12, 12 SSLR p 95[1]; the High Court case of *Trikkon Sdn Bhd v. Mahinder Singh Dulku* [2010] 5 CLJ 850 and the English case of *Bolton v. Law Society* [1994] 1 WLR 531 ('*Bolton*') which was held to be of persuasive value by the Malaysian Federal Court in *Ng Hock Cheng v. Pengarah Am Penjara & Ors.* [1998] 1 CLJ 405 ('*Ng Hock Cheng*'). The reason why *Ng Hock Cheng* (above) did not adopt *Bolton* (above) was because it was decided in relation to a professional body, where the disciplinary tribunal had punished a solicitor who breached the law society rules, but *Ng Hock Cheng* (above) related to dismissal of a Government servant after disciplinary proceedings were instituted by the Public Services Commission.

[38] The second respondent's counsel submitted that there was no prejudice to Dr. Lourdes not being given notice of the judicial review proceedings and/nor the opportunity to be heard at the same, on the basis that Dr. Lourdes was heard before the preliminary inquiry committee and the MMC, and the record of the proceedings before the MMC was before the High Court and Court of Appeal in the judicial review proceedings. We reject this contention as the principles of natural justice are not satisfied by reason of Dr. Lourdes having the opportunity to defend himself in the domestic inquiry proceedings. The right to be heard on the particular facts of the instant appeal, extended to all stages of the proceedings which affected him, and this includes the judicial proceedings. The Court of Appeal, with respect, erred in not considering the miscarriage of justice suffered by Dr. Lourdes when it imposed a finding of guilt on him and restricted his right to be heard in his defence to only putting in a plea of mitigation before the MMC.

The Second Question Of Law

[39] In the second question of law, counsel for Dr. Lourdes contended that the principle in the case of *Staghorn* ought not apply to bar Dr. Lourdes from applying to intervene to set aside the order of the Court of Appeal. The Federal Court held in *Staghorn* that an application for leave to intervene in order to set aside an order for sale by a party not already a party to the proceedings must be made before judgment, otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in. The judge also becomes *functus officio*. The Federal Court emphasised that just because the court is of the view that the order made earlier had caused injustice, it does not mean that the order to intervene should be given as the requirements of O. 15 r. 6 of the Rules of Court 2012 still have to be satisfied.

[40] The principle in *Staghorn* should not apply to court orders which are null, because that would then be unjust to parties affected by such orders, as was the case with Dr. Lourdes.

[41] We shall discuss the facts of *Staghorn* and proffer our reasons as to why it is inapplicable to the present case. The subject matter at stake in *Staghorn* was a piece of land which a company had charged to Hong Leong Bank as security for a loan. The company defaulted in the repayment of the loan and Hong Leong Bank took steps to realise the security. It obtained an order for sale from the court and the land was sold by public auction. More than two years after the public auction of the land, Staghorn Sdn Bhd applied to intervene to set aside the order for sale and the public auction. This was because after the company charged the land to Hong Leong Bank, the two registered proprietors of the land executed a sale and purchase agreement to sell the same land to Staghorn Sdn Bhd and Staghorn appointed Teck Lay Realty Sdn Bhd as the nominee for the purchase.

[42] A perusal of the case discloses that the primary reason for the decision is that Staghorn Sdn Bhd did not have any interest in the land, having nominated Teck Lay Realty Sdn Bhd in this regard. Staghorn Sdn Bhd's name was not on the land title (for that matter, neither was the name of Teck Lay Realty Sdn Bhd) and it accordingly had no interest in the land for the court to allow it to intervene and become a party to the foreclosure proceedings, which were already *functus officio* by that time. Since the public auction was successful, Staghorn could not assert rights superior to the purchaser who enjoyed an indefeasible title.

[43] Therefore, in *Staghorn*, the issues of an affected party not being given notice, and not being accorded the opportunity to be heard in his own defence did not arise in the same manner as in the present appeal. In *Staghorn*, this court found that Staghorn Sdn Bhd was not an interested party by reason of it having no interest in the land. Here Dr. Lourdes was a party most directly involved as the entire proceedings emanated from an allegation of professional misconduct on his part. He was central to the entire case and his exclusion from participation in one of the most important aspects of adjudication resulted in the reversal of a finding of innocence, without his having been heard in his own defence at all. A clearer case of a breach of one of the most fundamental rules of natural justice is rarely seen, and that rule is the right to be heard. (See *B Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 1 LNS 14: PC 2 Apr 1962 per Denning LJ.) This resulted in a serious miscarriage of justice.

[44] We have found above that Dr. Lourdes is an affected party. We are therefore of the view that *Staghorn* is inapplicable to the factual matrix of the present case as the facts, law and considerations differ were entirely different and distinguishable there. *Staghorn* also was decided on the considerable

length of time it took for Staghorn Sdn Bhd to apply to intervene. That is not the case here, as Dr. Lourdes had no notice whatsoever of the judicial review filed by Dr. Milton, until MMC took steps to carry out the order of the Court of Appeal and convened to hear Dr. Lourdes' plea in mitigation. There was no delay on Dr. Lourdes' part.

Ancillary Issues

[45] One ancillary issue that requires addressing is the reason why Dr. Lourdes did not appeal the High Court decision that a s. 31 appeal cannot be an avenue to challenge the Court of Appeal order. The answer proffered was twofold – first, the High Court held that Dr. Lourdes ought to set aside the Court of Appeal order, and that is what he proceeded to act on.

[46] Secondly, s. 31(2) of the Act at the material time provided that the decision of the High Court was final. Section 27 of Act A1443 deleted sub-s. 2 of s. 31 of the principal Act, therefore removing the restriction on appealing orders of the High Court in respect of s. 31 appeals. Act A1443 only came in to force on 1 July 2017 by virtue of the *Gazette* PU(B) 333/ 2017. It must be pointed out that this was two months before the decision of the High Court on 22 August 2017, so that Dr. Lourdes could have appealed, had he wished to do so.

[47] Having considered the chronology of events and the relevant law, we concluded that Dr. Lourdes ought not to have been shut out of intervening to set aside the Court of Appeal order, reversing the finding of innocence made against him. The refusal of the Court of Appeal to do so by the application of *Staghorn* is, with respect, erroneous. This is one of those rare cases that fall within the ambit of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 ('*Badiaddin*'). The intervention of the court is necessitated by a serious miscarriage of justice arising as a consequence of a breach of natural justice. We therefore proceeded to hear the substantive merits of Dr. Lourdes' appeal.

The Merits Of Dr. Lourdes' Appeal

[48] The appellant's counsel reiterated their position from the start, that Dr. Lourdes had never admitted to the charge against him. He admitted distributing the patients' clinical summaries but asserted that it was an honest mistake and so could not have amounted to infamous conduct in a professional respect.

[49] The second respondent's counsel argued for a broader application of the principle of *res judicata* by extending it to bind non-parties. He argued that even though Dr. Lourdes was not a party to the proceedings in the courts below, it would be an abuse of process to allow him to relitigate the matter. He contended that since the same facts are involved as the original suit, the doctrine of estoppel *per rem judicatum* applies to bar Dr. Lourdes from bringing this appeal.

[50] This is a tangled web which we must unweave. It is apparent from the submissions of the second respondent's counsel here, as well as in putting forth their preliminary objection on the issue of jurisdiction, that they have confused the High Court judicial review proceedings filed by Mr. Milton with the High Court proceedings in relation to the s. 31 appeal filed by Dr. Lourdes in relation to the MMC's decision to impose a reprimand upon him. We reiterate here, as we have done above under our discussion of the preliminary objection raised by the respondents, that these two proceedings are clearly not the same.

[51] First of all, Dr. Lourdes is not filing a new judicial review action in respect of the MMC's finding of no case to answer in respect of Dr. Milton's complaint. Dr. Lourdes filed an application to intervene in the Court of Appeal proceedings since Dr. Milton did not add him as a party to the original judicial review. Therefore, Dr. Lourdes is not attempting to have a second bite at the cherry and have his matter decided by different judges with a view to procure a possibly different and more favourable outcome. This is not, as contended by the second respondent's counsel, a re-litigation of the judicial review proceedings.

[52] Secondly, we refer to the case which the second respondent's counsel relied on, *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062; [2016] 3 MLJ 122 ('*Dato' Sivananthan*') where the Court of Appeal referred to the decision of Drake J in *North West Water Ltd v. Binnie & Partners (a firm)* [1990] 3 All ER 547 QBD ('*North West*'). We are of the view that these cases are inapplicable because the point of law in the instant appeal is different from that considered in those cases.

[53] In *North West*, the first action was brought by victims of an explosion against three parties: the water authority, the contractors of the system and the consultant engineers (ie, Binnie & Partners). The High Court found all three parties liable but the Court of Appeal held that the consultant engineers were wholly liable. That judgment was a final judgment.

[54] The second action in *North West* was brought by the water authority to recover damages against the consultant engineers for losses it had suffered. The consultant engineers sought to adduce fresh evidence to deny negligence. It was in this regard that the water authority raised the doctrine of estoppel to say that although the plaintiffs in the first action, ie, the victims of the explosion, were not parties to the second action, estoppel would still apply in the second action to prevent the consultant engineers from adducing fresh evidence to deny negligence. The rationale is that the finding of negligence against the consultant engineers is final and binding and no evidence could be now brought to alter that finding. That finding of negligence could not be re-litigated a second time.

[55] We note that in the present proceedings, Dr. Lourdes is not seeking to adduce fresh evidence to re-litigate the judicial review proceedings. He is seeking to intervene to be heard in respect of the finding of guilt made against him in his absence in the judicial review proceedings. Therefore, it is clear that the decision in *North West* is wholly inapplicable to this appeal.

[56] *North West* deals with an attempt to re-litigate a final finding of negligence against a party, whereas in the instant appeal, the appellant is seeking to exercise his right to be heard which was denied in the original judicial review proceedings.

[57] Dr. Lourdes although having had the opportunity to defend himself before the MMC, was not made a party in the judicial review proceedings before the High Court and Court of Appeal, and this failure to add him as a party precluded him from articulating his own defence before the courts. He was excluded to his detriment. We have stated above that the right to be heard is not restricted to merely domestic inquiry proceedings but extends to all available avenues of appeal. Dr. Lourdes not being joined as a party at the High Court and Court of Appeal levels, is a matter of serious detriment to him, particularly when the Court of Appeal made a finding of guilt on his part. Dr. Lourdes is without question an affected party, and thus pursuant to O. 53 r. 4(2) RC 2012, he was entitled to notice of the judicial review proceedings so that he could be heard in his own defence.

[58] The case of *Dato' Sivananthan* can be distinguished from the present case as the matter at stake there was a particular monetary sum paid in expectation of a joint venture agreement which failed. The rightful recipient of the monetary sum was sought to be determined in two different proceedings, which in itself amounted to a duplicity of proceedings. Not unexpectedly, the outcome of the two different proceedings resulted in conflicting decisions as the plaintiffs and defendants of the two cases were different. When the respective plaintiffs succeeded in summary judgment applications, naturally the outcome was that different defendants were held to be liable to pay the same sum to different plaintiffs. It is evident that the factual matrix of that case is wholly different from the present appeal. As such, the case is inapplicable.

[59] The facts here are entirely different. This is a case involving a breach of natural justice, rather than *res judicata* or issue estoppel. This in turn is because the adjudication of the substantive dispute was conducted in the absence of a primary actor. It is again different from a default situation because Dr. Lourdes was expressly excluded from the judicial review proceedings. This amounted to a deliberate act to preclude him from defending himself. This takes it out of the purview of the doctrine of *res judicata*, issue estoppel and abuse of process. We are therefore of the view that *Dato' Sivananthan* is distinguishable from the facts of this appeal.

Conclusion

[60] In summary, there were three decisions we made at the close of submissions. First, we dismissed the preliminary objection of both respondents that s. 96(a) of the CJA 1964 had not been complied with.

[61] Secondly, on the appeal proper, we unanimously decided that the order of the Court of Appeal was a nullity because the appellant was not given the right to be heard. We therefore allowed the appeal and set aside the order of the Court of Appeal. For avoidance of any doubt, we reiterate that we had answered the first question of law in the affirmative and the second question of law in the negative. For clarity, we set out the questions in full below.

The First Question of Law

Where at the hearing of an application for judicial review an adverse order is made against a person directly affected by the application, whether the order is a nullity within the meaning of the decision in *Muniandy a/l Thamba Kaunda & Anor v. D & C Bank Berhad & Anor* (FC) [1996] 1 MLJ 374 and ought to be set aside as of right, in a case where the person directly affected:

a) is not served Form 110, the statement and all affidavits in support or notified of the application and date of hearing, in breach of the mandatory requirements of Order 53 Rule 4(2), Rules of Court 2012; and

b) was consequently deprived of his right to be heard at the hearing at which the adverse order was made against him, in breach of the rules of natural justice.

Answer: Affirmative

The Second Question of Law

If the answer to Question 1 is in the affirmative, whether the principle in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v. Staghorn Sdn Bhd and Other Appeals*, FC [2008] 2 MLJ 622, that intervention under Order 15 Rule 6 of the Rules of Court will not be allowed where proceedings have come to an end, apply to a case where the order is a nullity for breach of the rules of natural justice and the mandatory requirements of Order 53 Rule 4(2), Rules of Court 2012 and intervention is sought for the purpose of setting aside the order.

Answer: Negative

[62] Finally, in respect of the notice of motion to intervene in the Court of Appeal (encl. 7a), we allowed prayers 2(a), (b) and (c) which are summarised as follows:

(i) The order of this court dated 27 October 2015 is set aside;

(ii) All steps and any action taken by the respondents pursuant to the order of this court dated 27 October 2015 is set aside, and any endorsement of the decision and order of the respondents on the Malaysian Medical Registry is nullified; and

(iii) The decision and order of the respondents dated 20 May 2014 to dismiss the charge against the proposed intervener for wrongful behavior in any professional sense under s. 29(2)(b) of the Medical Act 1971 is reinstated.

[63] We award costs of RM40,000 against each of the respondents subject to allocatur fees. The deposit, if any, is to be refunded to the appellant.

Endnotes:

1. Straits Settlements Law Reports dated 31 December 1911.